IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8064 OF 2006.

M/s.Kakade Associates. ... Petitioners.
Versus.
Smt.Salama Taherbai Gandhi. ... Respondent.

Shri Abhishek Pungalia i/by Shri Mohan Pungalia for the Petitioners.

Shri Sooraj Halke for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 19th June, 2007.

P.C.:

1. Rule. Advocate for the Respondent waives service. Taken up for hearing forthwith with the consent of the Advocates appearing for the parties. The Petitioners are the Defendants in a suit under Order XXXVII of the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code of 1908") filed by the Respondent. By the order impugned in this petition under Article 227 of the Constitution of India, the learned trial Judge has granted a conditional leave to the Petitioners to defend the suit on deposit of Rs.12,77,800/- in two equal instalments.

2. The submission of the learned Advocate appearing for the Petitioners is that the claim based on the dishonour of the cheques was barred by limitation. He submitted that the Summons for Judgment was never served

to the Petitioners. He submitted that the suit was not maintainable as a summary suit and in any event there was a plausible defence available to the Petitioners.

3. The learned Counsel appearing for the Respondents supported the impugned order by placing reliance on the agreement in writing dated 20th April 2001. It is submitted that the said agreement in writing refers to four cheques subject matter of the suit for total sum of Rs.4,25,000/-. He submitted that the agreement unequivocally records the agreement by the Petitioners to pay compensation at the rate of Rs.800/- per day of default of any amount outstanding including the amount of damages. He submitted that in view of the clear agreement in writing between the parties, the learned trial Judge was justified in passing the impugned order.

4. I have considered the submissions. In paragraph 4 of the plaint, a reference has been made to four cheques. The first cheque dated 6th May 2001 is for the sum of Rs.75,000/-. The said cheque according to the averments made in the plaint was dishonoured on 16th May 2001. The second cheque referred to is for the sum of Rs.1,15,000/- which was dishonoured on 22nd May 2001. The third cheque in the sum of Rs.1,15,000/- was dishonoured on 20th June 2001 and the fourth cheque in

the sum of Rs.1,20,000/- was dishonoured on 21st July 2007. The suit is filed on 7th June 2004. Therefore, the defence of limitation is available in so far as the claim based on the first two cheques is concerned.

5. A substantial part of the claim is on account of compensation at the rate of Rs.800/- per day from 6th May 2001. A perusal of the plaint shows that there is no specific reliance placed on the agreement dated 20th April 2001. The learned Advocate for the Respondent invited my attention to the averments made in paragraphs 7 and 8 of the plaint, which read thus:

> "7. The Plaintiff submits that, as the Plaintiff, has not heard anything from the Defendant nor received the amount. She has finally issued a legal notice dated 24.5.1991, 3.6.2001, 29.6.2001 and 27.7.2001 through her advocate and called upon the Defendant to pay the amount along with the compensation of Rs.800/- per day as agreed between the Plaintiff and the Defendant on 20.4.2004 expressly. However, despite of the due services the defendants not paid any heed and therefore, the Plaintiff had to file Criminal Proceedings under section 138 of the Negotiable Instruments Act against the present Defendants. The proceedings are pending before the Hon'ble

J.M.F.C. Pune at Cantonment against the present Defendants as Criminal Case No.3161/01, 3162/01, 3708/01, 3838/01.

8. The I and I entered in to express terms of repayment whereby the I agreed to pay Rs.800/- per by way of compensation to the I in case the I failed and neglected to pay amount due and payable. Despite repeated demands the I failed and neglected to clear and pay the dues to the I, thus the I is entitled for the compensation @ Rs.800/- per day from 06/05/2001 till actual realization."

In paragraph 7 the averment is that it was expressly agreed by the Petitioners to pay compensation at the rate of Rs.800/- per day. Paragraph 8 also refers to the agreement to pay Rs.800/- per day. However, there is no specific reference to the alleged agreement in writing dated 20th April 2001. The substantial part of the claim is based on the alleged written contract. However, as stated above, there is no specific reliance placed on the written contract in the plaint. Under Order XXXVII Rule 1(2) of the said Code, a summary suit is maintainable on a bill of exchange, hundies, promissory note as well as on a written contract. There is no specific pleading regarding the existence of the written contract. As pointed out earlier, a part of the

claim based atleast on two cheques is prima facie barred by limitation. There is no express averment in the plaint placing reliance on the written contract. It is thus obvious that the defence of the Petitioner by no stretch of imagination can be said to be illusory or sham or moonshine.

6. A submission was made by the Advocate for the Respondent that no triable issue is raised in the Application for leave to defend and these submissions are made for the first time in the High Court. It is obvious that on a plain reading of the averments made in the plaint, this was a case where an unconditional leave to defend ought to have been granted. Therefore, there is no merit in the said submission.

7. Hence the following order is passed:

(i) The impugned Judgment and order dated 28th August 2006 is quashed and set aside.

(ii) The application made by the Petitioner for grant of leave to defend the suit is allowed. The Petitioners are granted an unconditional leave to defend the suit filed by the Respondent.

(iii) Written statement shall be filed by the Petitioners within a period of 30 days from the date of receipt of writ of this order by the trial Court. No further extension will be granted.

(iv) The trial Court will hear and decide the suit as expeditiously as possible.

(v) All contentions of the parties on merits of the suit are expressly kept open.

Judge.